A

TEO KA FOOK

v.

LOO CHIAT HUI

B

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[DIVORCE PETITION NO: 33-234-2009-III]
17 MAY 2010

C ***FAMILY LAW:*** *Divorce - Petition - Domicile - Wife residing in Australia - Whether wife abandoned domicile of dependence in Malaysia - Whether court had jurisdiction to hear petition - Whether Certificate of Divorce issued by Australian court recognised*

D The husband petitioner filed a petition to dissolve the marriage with the wife respondent on the ground that the wife had behaved in such a way that he was not reasonably expected to live with her. The parties had two children by virtue of their marriage. The wife resided in Australia with the two children and the petition was served on her in Australia. The wife filed a summons in chambers E to strike out the petition on the ground that the Family Court of Western Australia ('the Australian Court') had already dissolved their marriage on 24 March 2009 which order took effect on 24 April 2009. The petition herein was filed on 12 August 2009. The F wife claimed that she and her husband were domiciled in Australia as they were permanent residents of that country although they still made frequent trips to Malaysia to visit their family and friends. The husband did not dispute knowledge of the dissolution of marriage by the Australian Court as he had received the Certificate G of Divorce issued by that court on 25 June 2009. However, he claimed that he was not served with the cause papers in respect of the proceedings in the Australian Court. He admitted having a permanent resident status in Australia which he claimed to have obtained to facilitate his children's education in that country.

H **Held (striking off the petition with costs):**

(1) The court's jurisdiction to dissolve a marriage and grant a decree of divorce under s. 48 of the Law Reform (Marriage and Divorce) Act 1976 requires the satisfaction of one of two things, I *ie*, the marriage was registered or deemed to be registered under the Act or where the law governing the union of the parties

provides or contemplates that it is monogamous. However, in both instances, the domicile of the parties to the marriage at the time of the presentation of the petition must be in Malaysia. (para 5)

(2) The domicile of a woman, once she marries, follows that of her husband. The law recognises that a domicile of dependence can be abandoned in favour of a domicile of choice, giving recognition, in so far as women are concerned, their independent right as a person. (para 6)

(3) Malaysia, unlike England and Singapore, does not have any legislation to abrogate a domicile of dependence acquired by a woman upon marriage but the absence of such legislation does not shackle Malaysian women to an archaic and ancient concept of dependence. As other countries have moved on to liberalise the position of their women on the issue of domicile, the evidence required to discharge the legal burden on a woman to show that she has abandoned her domicile of dependence must necessarily be lighter to reflect the growing recognition that society has for a woman's identity as a person in her own right - married or otherwise. (para 11)

(4) The wife had been residing in Australia since 2003. Her children have been largely brought up in Australia with the youngest finishing her tertiary education there. There was a matrimonial home in Australia where she lived and she only came back here for holidays with her children. In support of her divorce petition in Australia, she had sworn an affidavit that she intended to reside permanently in Australia. On the above evidence and her acquisition of permanent residence status in Australia, she had discharged the burden of proof to show an abandonment of her domicile of dependence in Malaysia. Further, the husband moved to file the petition on 14 August 2009 after receiving the Certificate of Divorce on 25 June 2009. Up until then, despite his claims of marital breakdown due to the unreasonable behaviour of the wife, he had not taken any action to end their marriage. (para 12)

(5) It was not the province of the court to decide on the validity of the Certificate of Divorce. The husband petitioner had to challenge it in the court that issued it. The issue herein was whether the certificate should be recognised as dissolving the marriage of the parties. (para 15)

(6) Recognition of a foreign judgment is part of the larger doctrine of comity of nations. Such a judgment or decree will be treated and acted upon by the Malaysian courts as final, notwithstanding any irregularity of procedure and the local law, so long as the foreign court has jurisdiction over the subject matter and the person brought before it; and the proceedings do not offend against natural justice *(Anthinarayana Mudaliar v. Ajit Singh)*. Also, a *decree nisi* granted by the High Court of England is recognised in Malaysia since the English courts exercise a similar jurisdiction to that of the Malaysian courts *(Siah Teong Woei v. Janet Traynor; Travers v. Holley and Holley)*. On the case authorities, it followed that the Certificate of Divorce issued by the Australian Court should be recognised by this court. (paras 16-18)

Case(s) referred to:
Anthinarayana Mudaliar v. Ajit Singh [1953] 1 LNS 2 HC ***(refd)***
Charnley v. Charnley and Betty [1959] 1 LNS 12 HC ***(refd)***
Joseph Wong Phui Lun v. Yeoh Loon Goit [1978] 1 LNS 76 HC ***(refd)***
Melvin Lee Campbell v. Amy Anak Edward Sumek [1988] 1 LNS 19 HC ***(refd)***
Siah Teong Woei v. Janet Traynor [2010] 3 CLJ 361 HC ***(refd)***
Travers v. Holley and Holley [1953] 2 All 794 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, s. 48

For the husband petitioner - Desmond Kho; M/s Kho & Partners
For the wife respondent - See Chee How; M/s Baru Bian

Reported by Usha Thiagarajah

JUDGMENT

Rhodzariah Bujang JC:

[1] The husband petitioner and the wife respondent were married on 5 May 1990 in Kuching and have two children, the eldest being born on 22 June 1991 and the youngest, on 19 April 1996. The husband petitioner has filed a petition to dissolve the marriage on ground that the wife respondent has behaved in such a way that he is not reasonably expected to live with her. The petition was served on the wife respondent in Australia where she resides with the two children.

[2] The wife respondent has on 18 November 2009 filed a summons in chambers to strike out the petition on the ground that the Family Court of Western Australia ("Australian Court") had already dissolved the said marriage on 24 March 2009 which order took effect on 24 April 2009. (The petition in this case was filed on 12 August 2009 which was about four months after the dissolution of the marriage by the Australian Court). The wife respondent claimed that both the husband petitioner and herself are domiciled in Australia as they are permanent residents of that country although they still make frequent trips to Malaysia to visit their family and friends.

[3] The husband petitioner did not dispute knowledge of the dissolution of marriage by the Australian Court as he has received the Certificate of Divorce on 25 June 2009 and his counsel was given the entire file of the divorce proceedings by the said court. However, the husband petitioner claimed that he was never served with the cause papers in respect of that proceeding and states, with regards to the issue of domicile, though he admitted to have permanent resident status in Australia since 2003, he only obtained it to facilitate his children's education in Australia. Further, from 2003 to 29 December 2009 he said he was only there for not more than 647 days. He also alluded to the fact that he still maintains their matrimonial home in Kuching and still has an active business in the form of two firms in Malaysia and these are evidence of his intention not to make Australia their permanent home.

[4] In view of the foregoing summary of the affidavit evidence, the first issue for my consideration is whether the wife respondent has abandoned her domicile of dependence in favour of her domicile of choice since the resolution of this issue will determine whether I have jurisdiction to hear the husband's petition. If I decide that I have the jurisdiction, then I must consider the second issue which is whether the divorce pronounced by and the Certificate of Divorce issued by the Australian Court is recognized and accepted by the courts here in Malaysia.

Abandonment Of Domicile Of Dependence

[5] The court's jurisdiction to dissolve a marriage and grant a decree of divorce under s. 48 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) requires the satisfaction of one of two things ie the marriage was registered or deemed to be registered

A under the Act or where the law governing the union of the parties provides or contemplates that it is monogamous but in all two instances, the domicile of the parties to the marriage at the time of the presentation of the petition must be in Malaysia.

B **[6]** It is also part of our law, that the domicile of a woman once she marries, follows that of her husband. This principle is rooted in common law and can be traced to an ancient law in France called *coverture* which in essence means that once married, a woman's identity is subsumed with that of her husband, and this was why for C example, in olden times, a woman is not allowed to hold any property under her own name. Mercifully much has improved to better the legal standing of a woman although her domicile is still tied to that of her husband's. Fortunately, the law recognizes that a domicile of dependence can be abandoned in favour of a domicile D of choice, giving recognition, in so far as women are concerned, their independent right as a person.

[7] I have spent a little bit of time to express this view because I believe that in keeping with the legal, socio-economic changes affecting women in Malaysia, statements of the law made in cases E such as *Charnley v. Charnley and Betty* [1959] 1 LNS 12 that the domicile of married woman is that of her husband's while the marriage subsists eventhough the parties are living apart must be viewed against the time frame it was decided. In so far as women are concerned much has changed since the 1960s and it would not F be wrong for me to say that from then till now, Malaysian women has broken many glass ceilings and empowered themselves both socially and economically.

[8] Besides the cited case above, the husband petitioner's counsel G has also submitted the case of *Joseph Wong Phui Lun v. Yeoh Loon Goit* [1978] 1 LNS 76, a Singapore case in which Chua J held that clear evidence is required to establish a change of domicile and the proof required to displace a domicile of origin is beyond a mere balance of probabilities. In considering whether that burden of proof H has been discharged, His Lordship held that the oath of a person whose domicile is in question as to his intention to change his domicile is not conclusive evidence.

[9] Now in respect of this cited case there is a clear I distinguishing feature apparent even at a first reading of it, which is, what the court had to consider there was displacement of

domicile of origin and in actual fact His Lordship found that the petitioner had acquired a domicile of choice in Singapore. It is interesting to note that just like the respondent in the present case before me, the petitioner had moved to Singapore and was granted permanent residence in Singapore after selling off his interest in a firm of accountants in Kuala Lumpur which he has helped to set up.

[10] The case of *Melvin Lee Campbell v. Amy Anak Edward Sumek* [1988] 1 LNS 19 also cited by the husband petitioner's counsel only reapplied and reinforced the heavy burden of proving the displacement of one's domicile of origin in favour of a domicile of choice but is not entirely helpful to the determination of the issue in this case.

[11] In this connection too, though I fully appreciate the husband petitioner's submission that unlike England and Singapore, Malaysia does not have any legislation to abrogate a domicile of dependence acquired by a woman upon marriage but the absence of such a legislation does not in my view, shackled Malaysian women to an archaic and ancient concept of dependence. Being alive to the fact that other countries have moved on to liberalize the position of their women on this issue of domicile, I believe that the evidence required to discharge the legal burden on a woman to show that she has abandoned her domicile of dependence must necessarily be lighter to reflect the growing recognition that society has for a woman's identity as a person in her own right – married or otherwise.

[12] In this case, the wife respondent has been residing in Australia since 2003. Her children have been largely brought up in the country and the youngest is finishing her tertiary education there. There is a matrimonial home there where she lives and she only comes back for holidays with her children as sworn in her affidavit filed in this case and in addition she has sworn an affidavit in support of her divorce petition in Australia that she intended to reside there permanently. I am satisfied on this evidence, particularly her long residence in Australia and her acquisition of permanent residence status there that she has discharged the burden of proof to show an abandonment of her domicile of dependence in Malaysia in favour of a domicile of choice in Australia. Thus, at the time of presentation of this petition, one of the parties was not domiciled

A in Malaysia and I should strike out this petition on that ground alone. It is also obvious from what was stated in the petition, the husband petitioner is moved to file this petition on 14 August 2009 after receiving the Certificate of Divorce on 25 June 2009 (see para. 9 thereof) because up till then, despite his claim of marital
B breakdown due to unreasonable behaviour of the wife respondent in early 2007 onwards (or even earlier as implied in paras. 14-17 of the petition), no action was taken by him to end their marriage. This consideration, in my view, is important to strengthen the prayer of the wife respondent that this petition be dismissed.

C

Recognition Of The Australian Certificate Of Divorce

13] Assuming I was wrong in concluding the first issue in the wife respondent's favour, I moved now to this second issue.

D **[14]** The husband petitioner claimed in his affidavit that he was not served with the cause papers in respect of the divorce proceedings initiated in Australia and only knew about it when he received the Certificate of Divorce on the date as mentioned earlier. Against that contention, the wife respondent has exhibited a letter
E from the Registrar of the Family Court of Western Australia to the husband petitioner's solicitor where it mentioned that the application for divorce was sent to the husband petitioner at his address in Kuching as stated in the petition herein by way of registered international post.

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[15] Now, I do not think that it is the province of this court to decide on the validity of the Certificate of Divorce. That the husband petitioner has to challenge himself in the court which issued it. What is infact in issue is whether I should recognize that
G Certificate as dissolving the marriage of the parties herein.

[16] Recognition of a foreign judgment is part of the larger doctrine of comity of nations. It has been said in *Anthinarayana Mudaliar v. Ajit Singh* [1953] 1 LNS 2 that such a judgment or
H decree will be treated and acted upon by the Malaysian courts as final, notwithstanding any irregularity of procedure and the local law so long as the foreign court had jurisdiction over the subject matter and the person brought before it and the proceedings do not offend against natural justice. Despite the passage of time, this principle to my knowledge, is applicable even today. YA Datuk Suraya Othman
I in *Siah Teong Woei v. Janet Traynor* [2010] 3 CLJ 361 had decided

that a *decree nisi* granted by the High Court of England is to be recognized here since the English courts exercises a jurisdiction similar to that of the Malaysian courts. Her Ladyship referred to and followed the English case of *Travers v. Holley and Holley* [1953] 2 All 794 in which the English courts recognized a decree of divorce granted by the Australian Court of New South Wales on the principle that recognition is given for a jurisdiction which the court themselves claimed.

[17] Her Ladyship quoted and applied in her decision, that part of the judgment of the English Court in which Hodson LJ held,

> … it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves. The principle laid down and followed since *Le Mesurier v. Le Mesurier* [1985] AC 528 must be interpreted in the light of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here.

[18] I am in full agreement with Her Ladyship and in a circuitous way based on the case authorities cited above, the Certificate of Divorce by the Family Court of Western Australia issued to the wife respondent in this case must also be recognized by me.

[19] For the reasons stated above, the petition filed herein is struck off with an agreed cost of RM3,000.